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No. 02-1371

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

REPLY BRIEF

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ARGUMENT

I. ENGAGING IN UNWARNED INTERROGATION IS LAWFUL.

Respondent grossly misstates the facts and the law in arguing that the circumstances of her arrest and interrogation, particularly the lack of warnings, rendered her initial unwarned statement actually involuntary – a claim that she did not make in the court below.

A. The investigating officer had good reasons to arrest and question respondent immediately after learning of her participation in the murder, and he did not act in "bad faith."

In characterizing Officer Hanrahan as acting "illegally," "improperly," or in "bad faith," respondent relies upon the faulty premise that any and all unwarned interrogation is "illegal." As detailed below, such questioning is not illegal; rather, under *Miranda* it is only presumptively coercive for purposes of determining the *admissibility* of unwarned statements. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). In various contexts, the Court has either condoned unwarned questioning or acknowledged that, standing alone, it does not violate the Constitution. *See* part III.A., *infra*. Here, the officer's actions were in no way improper. Officer Hanrahan was not circumventing *Miranda* or thumbing his nose at the Court's rules; rather, in good-faith reliance upon *Miranda* and its progeny, he used a technique that satisfied both the spirit and the letter of the Court's rulings. This case is not about any alleged villainy of Officer Hanrahan (or other forms of alleged illegality by officers' actions across the nation); rather, it is about the impact of his lawful actions in response to the unfolding tragedy and absolute horror of respondent's crime.

This is how the investigation actually unfolded.

After the murderous fire engulfed respondent's house and consumed the helpless Donald Rector and

the body of respondent's cerebral-palsy-stricken child, Officer Hanrahan and other local law enforcement officers went to work to solve the crime. Respondent's son, Darian Seibert, and respondent's intimate friend, Derrick Roper, had been injured in the fire, and Officer Hanrahan went to the local hospital where they had been sent for initial treatment. (J.A. 14; Tr. 765). It was there that Officer Hanrahan first met respondent. (J.A. 14-15, 41). Respondent approached Officer Hanrahan and asked "if everyone got out or if anybody was hurt," and he had the unpleasant task of informing her that two bodies were found in the burned-out trailer. (J.A. 15, 24-25, 41). At that time, Officer Hanrahan did not know that respondent (due to her participation in the crime) was already well aware that two bodies would be found. (J.A. 14-15, 24-25, 67-73).

On February 14, 1997, Officer Hanrahan talked to respondent again, this time at a hospital in St. Louis. (J.A. 15-17, 42). He told her about the evidence he had obtained and his "concerns that there may have been some foul play on the part of her son and Derrick." (J.A. 16). Respondent was still was not a suspect at that time (though she had not been "ruled out"). (J.A. 16, 26).

But two days later, the case started to break open. The evening of February 16, 1997, Officer Hanrahan had a conversation with Derrick Roper and another person who knew Roper. (J.A. 46). Information obtained during those interviews implicated respondent in the plan to burn down her trailer home and provided the probable cause necessary to arrest respondent. (J.A. 46). Once respondent's role in the fire and the murder of Donald Rector became clear, Officer Hanrahan set out to arrest her. (J.A. 46). The investigation was taking place in Rolla, Missouri (J.A. 14), approximately 100 miles from St. Louis. Before he could arrest respondent, he contacted a local prosecutor, made arrangements with St. Louis County to have respondent arrested, traveled to St. Louis, and met up with the arresting officer. (J.A. 17, 27, 51-52, 54). He finally arrived at the hospital in

St. Louis County, in the company of the arresting officer, and arrested respondent at about 3:00 a.m. (J.A. 26-27).

At this point, respondent misstates the record, demonstrating the danger of focusing on Officer Hanrahan's subjective intent. In an attempt to support her claim that "Hanrahan arrested [her] at a time and place that would maximize her grief and anxiety" (Resp. Br. 1), respondent argues that Officer Hanrahan "knew that Seibert was 'grief-stricken,'" that he arrested her at 3:00 a.m. "to ensure a more pliable suspect," and that he strategically increased the coercive effect of the stationhouse by "taking [her] away from dying Darian at 3:00 a.m., with Jonathan's funeral scheduled for the next day."[1] (Resp. Br. 30, 36). Finally, respondent makes the wholly unsupported assertion that the arrest occurred as it did because the "prosecutor and Hanrahan" were "frustrated that [respondent] did not implicate herself during previous informal questioning." (Resp. Br. 42).[2]

That is far from the truth. Officer Hanrahan no more "orchestrated" the arrest to "maximize [respondent's] grief" than he orchestrated the death, murder, and arson that gave rise to that "grief." As the evidence in this case shows, it was respondent who orchestrated the crime because she feared that she would be held responsible for the death of Jonathan, who was malnourished and had bedsores. It was respondent's consciousness of guilt that drove her to try to hide her child's untimely death, it was respondent's refusing to report Jonathan's death and prompting that led her son and her friend to burn

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[1] Darian, of course did not die; he lived to be the state's principal witness against his mother at trial. (Tr. 849-875). Additionally, there is no evidence that, at the time of the arrest, Officer Hanrahan was aware of when Jonathan's funeral would take place.

[2] Officer Hanrahan could not have been "frustrated" with respondent for failing to incriminate herself earlier because she was not a suspect when those earlier conversations occurred.

down her home, it was respondent's plan that Rector would be sleeping when the fire was set, and it was respondent's twenty-dollar bill that paid for the gasoline can and gasoline that was used to such murderous and injurious ends. (J.A. 67-70; Tr. 795, 858-864, 874, 908; State's Exhibit 42). To suggest that Officer Hanrahan acted improperly in arresting respondent while she was "grieving" is outrageous. It shows a callous disregard for the seriousness of her crime and a lot of chutzpah.

In responding to unfolding events, Officer Hanrahan did not "orchestrate" the timing of the arrest. He had no control over the moment when Derrick Roper (or anyone else for that matter) would come forward with information that incriminated respondent – any more than, for example, the officer in *Quarles* had control over the moment when an apparent rape victim would come forward and identify her attacker. *See New York v. Quarles*, 467 U.S. 649, 651-652 (1984). There is no evidence that Officer Hanrahan delayed in making the arrangements for respondent's arrest and traveling to St. Louis. Once he learned that respondent was involved, it was his duty to track her down and make the arrest. He was not bound to arrange an arrest at a time more convenient for respondent, and it would little serve the public to require police to act only during normal business hours. The timing of the arrest speaks not to deviousness but to dedication. Officer Hanrahan did what any competent officer would have done: he promptly arrested an apparently dangerous criminal.

This was entirely lawful police conduct. Respondent claims that aside from subverting her free will, there was "no . . . reason" to arrest her and take her away from her "dying Darian" at 3:00 a.m. (Resp. Br. 29-30, 36). But in fact, there was. Reasonable officers know that when a conspiracy unravels, it becomes more likely that the conspirators will learn of their peril and attempt to evade justice by fleeing, obstructing justice, or taking more drastic measures, such as killing the other conspirators.

Here, any of these events was possible. Respondent was already in St. Louis, probably with some of her belongings; she had exhibited virtually no concern for the well being of her children; and she had arranged to have her home burned down just a few days earlier. She had little reason to maintain or return to her residence in Rolla, and she had ample reason to flee.

Then, when the investigation turned up information that respondent was involved in the murder, the underlying facts would have rung an ominous bell of warning in any reasonable officer's mind. Consider that respondent had apparently neglected her helpless, disabled child; that she had planned to cover up that death by burning down her own home; and that she had prevailed upon her own son to commit murder. Moreover, consider that respondent was, at the very time the investigation revealed her role in the murder, at the hospital with her seriously injured son, who was a potentially damning state's witness (which, in fact, he turned out to be). A reasonable officer confronted with these facts would have recognized – even if only instinctively – the dangerous possibilities of delay, and he would have done precisely as Officer Hanrahan did. Indeed, because respondent had shown no compunction about taking extreme, murderous measures to cover up what she now blithely claims was "likely" a death caused by medical complications (Resp. Br. 1), a reasonable officer could have easily concluded that respondent would harbor even less reluctance to cover up her active role in a murder. We will never know what might have happened if Officer Hanrahan had put off his sworn duties and delayed the arrest until a more convenient time.

Additionally, two people in respondent's household were already dead, and one was seriously injured. The full extent of the conspiracy was not known to law enforcement – there were multiple possible conspirators – and each unknown conspirator was a proverbial

loaded gun. Any well-trained officer under these circumstances could have reasonably concluded that immediate questioning was necessary and that the cost of *Miranda* warnings "would have been something more than merely the failure to obtain evidence useful in convicting" respondent. *See New York v. Quarles*, 467 U.S. at 657. Indeed, the cost to society could have been further injury to other victims, the injury or death of other conspirators, the destruction of evidence, and the expenditure of additional resources to investigate the case and bring the proper parties to justice. Moreover, once respondent was arrested, it made sense to immediately question her. If Officer Hanrahan had delayed the questioning for several hours, there may have been an argument that the longer detention had a coercive effect upon respondent. *See generally Davis v. North Carolina*, 384 U.S. 737, 752 (1966) (length of detention can affect voluntariness of a confession).

B. No decision of the Court makes the "reasonableness" of the officer's pre-warning actions the test for admitting a post-warning statement; but if the Court is inclined to define "improper tactics" as something other than actually coercive conduct, then the needs of legitimate law enforcement are relevant to the inquiry.

Respondent's extensive recitation of what she deems to be the facts is necessarily tied to her assertion that statements made in a post-warning interrogation are inadmissible if the officer was acting unreasonably by questioning before warning. (Resp. Br. 28-33). But that is not the rule – nor should it be.

Reasonableness lies at the heart of Fourth Amendment analysis. *See Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977). But "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v. Connelly*, 479 U.S.

157, 170 (1986). What respondent is really arguing, as suggested by the dissent in *Elstad*, 470 U.S. at 354-356, is that officers must justify any unwarned questioning.

In the Fifth Amendment context, the reasonableness of the officer's actions has been tied to admitting *unwarned* statements obtained under exigent circumstances. *See New York v. Quarles*, 467 U.S. at 656-657. However, when there are both unwarned and warned statements, and where the state seeks only to admit the warned statements, the rule of *Elstad* – which asks whether the officer engaged in actual coercion or other improper tactics that rendered the first statement involuntary – should control the inquiry. And *Elstad* made clear that the failure to give *Miranda* warnings alone is not an improper tactic. *See Oregon v. Elstad*, 470 U.S. at 343 (Brennan, J., dissenting) (recognizing that the majority implicitly held that failure to warn is not an "improper tactic[]"). If the Court is inclined to define "improper tactics" as something other than actually coercive conduct, the principles of legitimate law enforcement discussed in *Quarles* are relevant in determining whether a particular pre-warning interrogation tactic was so egregious as to be "improper."

Here, it was while the investigation was ongoing, that Officer Hanrahan arrested respondent and interrogated her. He undoubtedly had in mind the prosecutor's admonition to "make a case," but he also had the demands of public safety to consider. This was a complicated case of horrific dimensions, and there were multiple possible conspirators. Thus, while Officer Hanrahan obviously wanted respondent to give statements, it can be concluded, based upon the objective circumstances of the case, that he did not question her "solely to elicit testimonial evidence." *See New York v. Quarles*, 467 U.S. at 658-659.

As in *Quarles*, valid and objectively reasonable public-safety concerns justified Officer Hanrahan's

interrogating respondent without *Miranda* warnings. At the time of the questioning, the entent of the conspiracy was not known to the officers, and, as the record shows, the officers questioned respondent about the other people present in her home during the planning (J.A. 67-70, 72). It was objectively reasonable for the officer to question respondent in a way that was likely to yield information, *regardless of whether that information was later admissible at trial*, because there was an ongoing risk of further harm to society. Respondent claims that "[t]his is false," because in her view, Officer Hanrahan was only interested in blaming her for the crime. (Resp. Br. 43). But this claim ignores the objective circumstances of the case – where, as the conspiracy began to unravel, the conspirators began to point fingers at each other – and relies too much upon a simplistic view of the record. As stated in *Quarles*:

> In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives – their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

New York v. Quarles, 467 U.S. at 656 (footnote omitted). These observations are equally applicable in this case.[3]

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[3] Admittedly, the spontaneity of the questioning in this case was less than that in *Quarles*; however, because petitioner is not arguing for the application of the public-safety exception, the need for spontaneity is considerably lessened. In *Quarles*, the prosecution actually admitted an unwarned statement; here, we seek to admit a statement obtained only *after Miranda* warnings were administered.

See also Baltimore City Dept. of Soc. Servs. v. Bouknight, 493 U.S. 549, 561 (1990) (where there was concern for the child's safety and the state had a regulatory interest in the child, the child's mother could not assert the Fifth Amendment privilege to avoid producing the child).

Moreover, it was neither improper nor unreasonable for Officer Hanrahan to fear that respondent might not make statements if first given the *Miranda* warnings. According to *Quarles*, this "fear" is entirely proper when confronted with circumstances that threaten the public:

> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.
>
> * * *
>
> In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding.

New York v. Quarles, 467 U.S. at 656-657. The same was true in the case at bar, and in some ways to a greater extent. In *Quarles* there was one suspect and one gun; here, there were multiple suspects and Officer Hanrahan did not know how many proverbial guns. It was objectively reasonable for him to seek information, so long as he did not resort to coercive conduct.

In short, it cannot be said that the early-morning arrest and unwarned interrogation were "improper tactics" that would except this case from *Elstad*. Merely interrogating respondent while she was "grieving" – even if accompanied by psychological interrogation tactics – did not render her statements involuntary. *See Colorado*

v. Connelly 479 U.S. at 164 ("a defendant's mental condition, by itself and apart from its relation to official coercion, should [not] ever dispose of the inquiry into constitutional 'voluntariness.'"); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (the Court refused to find that a defendant who confesses after being falsely told that a codefendant has turned state's evidence, does so involuntarily). Nor should the Court presume, as the Missouri court did, that the officer's purpose was to overcome respondent's free will. As more fully set forth in petitioner's opening brief and discussed in part II.A., *infra*, the traditional indicia of coercion were largely absent from this case: the interrogation was short, and respondent was not held incommunicado (she made no request to speak to anyone), deprived of food, subjected to physical violence or threats of any kind, or subjected to any of the various "third degree" methods of interrogation. Nor were there promises made to induce her to speak. Those are the types of government conduct – the kind of over-reaching condemned in many cases – that must be present before it can be said that the officer's actions overbore the individual's will. *See Colorado v. Connelly*, 479 U.S. at 167, 170 (stating that "coercive police activity is a necessary predicate" to finding that a confession is involuntary and, quoting *Elstad*, stating that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'").

II. RESPONDENT'S SECOND, WARNED STATEMENT WAS ADMISSIBLE UNDER EXISTING LAW, AND *MIRANDA*'S EXCLUSIONARY RULE SHOULD NOT BE EXPANDED TO DETER CONDUCT THAT IS NEITHER ILLEGAL NOR IMPROPER.

The *Elstad* rule asks first, whether the unwarned statement was actually coerced; and second (if the unwarned statement was not coerced), whether the warned statement was voluntary. *Oregon v. Elstad*, 470 U.S. at 309-311, 318. Respondent attempts to truncate

the case, arguing that *Elstad*'s rule never came into play because (a) the initial questioning was coercive, and (b) the post-warning interrogation "exploit[ed]" the prior, involuntary statement. (Resp. Br. 35). Neither the facts nor the law supports either claim.

A. The initial unwarned questioning was not actually coercive.

A finding that the initial questioning was actually coercive would, of course, have been dispositive under *Elstad*; however, the Missouri court did not go in that direction for one simple reason: the record demonstrates that the unwarned statement was voluntary.

Respondent attempts to fit her case into the taint-and-dissipation analysis of *Westover v. United States*, 384 U.S. 436 (1966). Indeed, respondent asserts that her case is "nearly identical" to *Westover*. (Resp. Br. 47). By quoting an incomplete phrase from the Missouri Supreme Court's opinion, she also suggests that the Missouri court concluded that her first statement was actually involuntary. (Resp. Br. 17, 37). But the Missouri court reached no such conclusion (Pet. App. A5-A9), and a review of the *Westover* case reveals why.

In *Miranda*, the Court's discussion of *Westover* was very brief, but the Court did note two salient facts: first, that the suspect was interrogated by police officers "at length" while in custody for fourteen hours; and second, that there had been no warnings. *Id.* at 494-496. He was then turned over to federal agents who continued to interrogate him without "an articulated waiver of rights." *Id.* at 496.[4] Admittedly, the Court stated generally that the four cases decided together in *Miranda* "might not" have involved coercion under the traditional standard;

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[4] The brief for the United States also reflects that the federal authorities gave Westover warnings that would not have satisfied *Miranda*'s requirements. Brief for the United States at 9-10, *Westover v. United States*, 384 U.S. 436 (1966) (No. 761).

but, in discussing *Westover* specifically, the Court essentially concluded that the "prior statement" was actually coerced. *See id.* at 496-497 (confession was the result of "pressure" applied by local police officers in "compelling surroundings"). The Court's view of the initial interrogation in *Westover* was made clear in *Oregon v. Elstad*, 470 U.S. at 310, where the Court cited *Westover* as a case involving actual coercion. *See also Michigan v. Mosley*, 423 U.S. 96, 106-107 (1975) (describing the initial unwarned interrogation in *Westover* as "intense and prolonged"). Accordingly, in *Westover*, the Court refused to assume that Westover had intelligently waived his constitutional rights. *Westover v. United States*, 384 U.S. at 495-496.

It is no wonder, therefore, that respondent alone – and not the Missouri court or either amicus supporting respondent – cites *Westover*. Except as an example of what this case is not, *Westover* adds little substance to the discussion: respondent, unlike Westover, was not subjected to "intense and prolonged" unwarned interrogation; and respondent, unlike Westover, was fully and carefully advised of the *Miranda* warnings, and she affirmatively waived her rights before making her second statement. Thus, in every important respect, the salient facts of this case are "polar opposites" of the facts in *Westover*. Additionally, no recording apparently existed in *Westover*, but as proof of how the questioning occurred in this case, petitioner urges the Court to review the tape (State's Exhibit 42) and judge whether Officer Hanrahan compelled respondent to speak.

B. It is an unwarranted extension of *Miranda* to apply a "fruits" analysis to conduct that is not illegal, and, consequently, "exploitation" of an unwarned statement should only be improper if it is used to obtain a waiver.

Exploitation of an illegal act is one factor the Court may consider in applying the taint-and-dissipation

analysis of the "fruits" doctrine. But the lack of a constitutional or statutory violation should remove this case from the ambit of the "fruits" cases.

In *Miranda*, the Court provided enlarged protection for the Fifth Amendment by attaching a presumption of coercion to unwarned interrogation. *Oregon v. Elstad*, 470 U.S. at 307. It then applied the narrow exclusion provided for in the Fifth Amendment to such unwarned questioning, creating a rule of admissibility. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the *admissibility* of any statement made by a defendant.") (emphasis added). As the Court noted in *Dickerson*, *Miranda* is overexclusive in that it may exclude statements that are not involuntary and therefore do not run afoul of the Fifth Amendment. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). But the Court concluded that overexclusion, while socially costly, is necessary to guard against the risk of undetected coercion. *Id.* at 442, 444. The Court has never applied a broad "fruits"-style exclusion to a *Miranda* violation because that would extend the already overexclusive *Miranda* rule beyond what is needed to protect the core guarantee of the Fifth Amendment. In *Dickerson* the Court declined to go beyond the holding of *Miranda* and implicitly upheld *Miranda*'s progeny, *id.* at 432, 442. But respondent would have the Court extend the fruits doctrine into *Miranda* and effectively eliminate *Miranda*'s progeny – particularly *Oregon v. Elstad*.

Under *Elstad*, "exploitation" of an unwarned statement is improper if it undermines a suspect's ability to make a knowing and voluntary waiver. *See Oregon v. Elstad*, 470 U.S. at 316. Consequently, the Court should not conclude that Officer Hanrahan's limited references to the unwarned statement affected the knowing and voluntary nature of respondent's waiver.

At the beginning of the second interrogation – *prior to any reference to the unwarned statement* – and after a fifteen- to twenty-minute break, Officer Hanrahan carefully and fully advised respondent of the *Miranda* warnings. (J.A. 58, 65-66). And it was no rote recitation. Point by point, Officer Hanrahan read each of the warnings to respondent and asked respondent to initial each one. (J.A. 19-20, 46-47, 65-66; State's Exhibits 37, 42). Nor was it a mere formalizing of what had gone before. Officer Hanrahan ascertained that respondent understood the warnings and that she wanted to make a statement. (J.A. 20, 46-47, 65-66). He did not by word, deed, or intonation downplay the importance of the warnings. (J.A. 19-20, 46-47, 65-66). In fact, by starting the tape recorder, solemnly administering the *Miranda* warnings, and executing a written waiver, Officer Hanrahan fully conveyed the gravity of the situation and scrupulously honored the demands of *Miranda*. Thus, as the record shows, respondent's waiver occurred before Officer Hanrahan made any reference to the unwarned statement, and, accordingly, in the absence of coercive conduct or "improper tactics," the warnings were fully effective in enabling respondent to make a valid waiver. *See Oregon v. Elstad*, 470 U.S. at 310-311, 316.

When Officer Hanrahan finally began the warned questioning, he said, "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (J.A. 66). This comment was introductory and did not mention the cat that had been let out of the bag. More importantly, however, this comment, like the tape recording itself, served a specific purpose: to make a record of the officers' dealings with respondent. Officer Hanrahan never hid the fact that he had engaged in a two-stage interrogation, and this first comment acknowledged that fact for the record.

The second reference came closer to mentioning an unwarned incriminating statement, but it stopped short

of that point. Officer Hanrahan merely said, "Now, in discussion you told us, you told us that there was a [sic] understanding about Donald." (J.A. 70).

The third reference to the unwarned statement occurred after respondent told Officer Hanrahan something that did not match what she had previously said. When respondent claimed not to have "thought about" Donald Rector's probable fate, Officer Hanrahan asked, "Trice, didn't you tell me that he was supposed to die in his sleep?" (J.A. 70). To this question, respondent stated that Rector was on new medication, and she then agreed that he was supposed to die in his sleep. (J.A. 70). The third reference was nothing more than Officer Hanrahan's clarifying what he thought respondent had said earlier. It was, therefore, analogous to impeaching a defendant with an unwarned statement – a practice the Court has specifically upheld. *See Harris v. New York*, 401 U.S. 222, 224-226 (1971).

Officer Hanrahan did not "exploit" the unwarned statement to obtain a waiver. Had he cajoled respondent into waiving her rights by telling her that silence would not avail her due to her previous statement, or had he confronted her with the previous statement upon her invocation of her right to remain silent, then it could be said that he "exploited" the unwarned statement.

Additionally, Officer Hanrahan's use of the unwarned statement did not render respondent's subsequent warned statement involuntary. The Court determined in *Elstad* that the "cat out of the bag" does not, in itself, render a subsequent warned statement involuntary. *Oregon v. Elstad*, 470 U.S. at 310-312. It naturally follows, therefore, that after a suspect executes a valid waiver and voluntarily chooses to make a second statement, referring to the suspect's guilty secret has no more coercive effect than the initial disclosure.

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO EXPAND THE SCOPE OF *MIRANDA* AND EFFECTIVELY ELIMINATE *ELSTAD* AND *MIRANDA*'S OTHER PROGENY.

A. Respondent overreaches when she suggests that there is a blanket ban on pre-warning interrogation.

When respondent is not focusing on claims that cannot be justified by the facts, she overstates the law. Most notably, she argues repeatedly that pre-warning questioning always poisons post-warning answers. There is no such rule. Nor could there be without modifying a long line of precedents.

Respondent restates the question presented, and asserts therein that *Miranda* "constitutionally *requires* the giving of warnings at the outset of a custodial interrogation." (Resp. Br. i). There is, however, no constitutional or statutory *requirement* that warnings be given prior to any and every custodial interrogation. Respondent cites various instances where the Court has stated that warnings must precede custodial interrogation (Resp. Br 11-12), but those isolated references are not apposite and do not dictate the outcome here.

In the thirty-seven years since *Miranda*, the Court has made clear that *Miranda* announced a rule limiting the *admissibility* of unwarned statements in the prosecution's case in chief. *See Dickerson v. United States*, 530 U.S. at 443-444 (*Miranda*'s "core ruling [was] that unwarned statements may not be used as evidence in the prosecution's case in chief"); *Oregon v. Elstad*, 470 U.S. at 306-309 (the Court reduced the impact of *Miranda* when it recognized that simply withholding the warnings "should not breed the same irremediable consequences" as actual infringement of a constitutional right); *see also New Jersey v. Portash*, 440 U.S. 450, 459 (1979) ("compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any

testimonial use whatever"). And even *Miranda*'s general rule is not absolute. *See New York v. Quarles*, 467 U.S. at 655-656 (creating a public-safety exception). In short, the Court has recognized that unwarned questioning alone does not violate the Constitution. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2000-2002 (2003) (plurality opinion) ("[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution); *id.* at 2006-2007 (Souter, J., concurring in judgment) (rejecting claim that "questioning alone was a completed violation" of the Fifth Amendment); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part) (agreeing "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues").[5]

B. Respondent's "parade of horribles" has little to do with this case and does not justify an expansion of *Miranda* that would largely eliminate *Miranda*'s progeny.

Despite the apocalyptic tone of respondent's brief, this case will not determine the ultimate destruction or preservation of the Fifth Amendment privilege. In suggesting otherwise, respondent and amici in support of respondent cite numerous instances of alleged official misconduct, particularly in California, where officers have refused to honor a suspect's invocation of her rights. (Resp. Br. 19-23; Brief for the ACLU *et al.* at 9-23; Brief for Former Prosecutors, *et al.* at 19). Respondent cites three law review articles, each citing a litany of cases where officers have refused to honor suspects'

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[5] Respondent cites the Missouri Attorney General's *Front Line Report* to assert that the Attorney General considers unwarned questioning "faulty." (Resp. Br. 2). But the purpose of the newsletter is to alert officers to judicial decisions and legislative changes. The description of this case therein reflects what the Missouri court held, not the Attorney General's opinion as to the propriety of the holding.

invoking their rights. (Resp. Br. 20). But that tactic is not at issue in this case, and, in any event, the Court has already laid down guiding principles to govern such cases. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("If, in a given case [where an officer refuses to honor an invocation], the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."). Similarly, the Court has laid down guiding principles in *Elstad* and *Quarles* for cases where an officer does not administer the *Miranda* warnings.

Consequently, the rhetoric aimed at Officer Hanrahan for his role in this case – the allegations of illegal actions and unreasonable conduct – is simply not warranted. Officer Hanrahan was not a rogue officer bent upon destroying respondent's ability to exercise her right to remain silent. He understood that unwarned statements were inadmissible, and before he sought admissible statements, he fully complied with *Miranda*, even taking the extra (and legally unnecessary) step of tape recording the second interrogation.

C. *Miranda* and its progeny provide both adequate protection for the Fifth Amendment privilege and meaningful deterrence.

Respondent portrays petitioner as seeking to overthrow the rule of *Miranda* (Resp. Br. 6, 8-9), but the reverse is true. Petitioner fully accepts the rule of *Miranda*, and petitioner, unlike respondent, is convinced that the *Miranda* warnings are strong enough and effective enough to meaningfully apprize a suspect in custody of her rights – even when, as discussed in *Elstad*, the suspect has previously made an unwarned statement. Petitioner is convinced that *Miranda* and its progeny are fully effective in maintaining the balance between protecting the individual and protecting "society's compelling interest in finding, convicting, and

punishing those who violate the law." *See Moran v. Burbine*, 475 U.S. 412, 426 (1986).

Since *Miranda*, the Court has recognized that the purpose of *Miranda* was not to "mold police conduct for its own sake." *Id.* at 425. To the extent that deterrence is a goal of *Miranda* and its progeny, it is deterrence of coercion – not deterrence of unwarned interrogation – that is paramount, and exclusion of the unwarned statement from the prosecution's case in chief is a sufficient remedy. The Court has said so repeatedly – in *Dickerson*, 530 U.S. at 443-444, in *Elstad*, 470 U.S. at 318, and most recently in Justice Kennedy's opinion in *Chavez*, 123 S.Ct. at 2013.

Indeed, as Professor Weisselberg – the author of one of the amicus briefs in support of respondent and of two of the law review articles cited in her brief – acknowledges, even if warnings are not viewed as mandatory in all situations, "*the police probably will still give the warnings* because if warnings are given and a suspect waives his or her rights, a court will admit at trial any resulting statement for all purposes." Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 153 (1998) (emphasis added). This observation is correct for several reasons. Officers generally question a suspect in the hope of acquiring admissible evidence of guilt, and, though statistics vary, it is clear that most suspects waive their rights and proceed to make statements.[6] In addition, as the Court has recognized, the giving of *Miranda* warnings benefits law enforcement as much as it does the individual. *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("cases in which a defendant can make a colorable argument that a self-incriminating

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[6] Paul G. Cassell & Bret S. Hayman, *Police Interrogations in the 1990s*, 43 UCLA L. REV. 839, 859-860 (1996) (roughly 80% of suspects waive their *Miranda* rights); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1012 (2001) (78% - 96% of suspects waive after warnings).

statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); *Michigan v. Tucker* 417 U.S. 433, 443 (1974) (noting that the warnings "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost"). Moreover, an officer's choice *not* to give *Miranda* warnings prior to questioning becomes one factor, in the totality of the circumstances, that weighs against a finding of voluntariness. *See Davis v. North Carolina*, 384 U.S. at 740-741. These factors make the Court's current narrow exclusionary rule an adequate deterrent to pre-warning questioning.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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